88- 1733

No. ____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1988

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

*Petitioner,*

vs.

DORIS STAMEY,

*Respondent.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND SUGGESTION FOR SUMMARY REVERSAL

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Eleventh Circuit erred when, after reversing a directed verdict on a claim of age discrimination, it entered judgment on the claim against Petitioner without providing Petitioner an opportunity in either the district court or the court of appeals to present its case, contrary to this Court's holding in *Fountain v. Filson*, 336 U.S. 681 (1949).

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner Southern Bell Telephone and Telegraph Company as defendant appellant and cross-appellee and Respondent Doris Stamey as plaintiff, appellee and cross-appellant.*

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* Pursuant to Supreme Court Rule 28.1, Petitioner states that the following list contains the names of all corporations in which outside persons or investors might have an interest that are related as a parent, subsidiary or affiliate to Petitioner Southern Bell Telephone and Telegraph Company: BellSouth Corporation, BellSouth Services, Inc., Southern Bell Advanced Systems, Inc., South Central Bell Telephone Company, South Central Bell Advanced Systems, Inc., Bell Communications Research, Inc., BellSouth Enterprises, Inc., American Cellular Communications Corporation, Augusta Cellular Corporation, BellSouth Advanced Systems, Inc., BellSouth Advertising and Publishing Corporation, BellSouth Australia, Inc., BellSouth Communications, Inc., BellSouth Financial Services Corporation, BellSouth Government Systems, Inc., BellSouth Information Systems, Inc., BellSouth International, Inc., BellSouth Inversora, S.A., BellSouth Mobility, Inc., BellSouth Ventures Corporation, Dataserv, Inc., Dataserv International, Inc., Graphics Holding Company, L. M. Berry and Company, SouthStar Ventures, Inc., SunLink Corporation, TechSouth, Inc., Tri Data Systems, Inc., Universal Communication Systems, Inc., BellSouth Mobility, Inc., Alabama Cellular Services, Inc., Georgia Cellular Service, Inc., Baton Rouge CGSA, Inc., Chattanooga CGSA, Inc., Kentucky CGSA, Inc., Memphis CGSA, Inc., Florida Cellular Service, Inc., Nashville CGSA, Inc., Orlando CGSA, Inc., South Carolina Cellular Service, Inc., Space Coast Cellular, Inc., BellSouth Personal Mobile Communications Corporation, Commtel, Inc., BellSouth International (Asia/Pacific), Inc., Graphics Holding

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No. _____

In The

# Supreme Court of the United States

October Term, 1988

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

*Petitioner,*

vs.

DORIS STAMEY,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Southern Bell Telephone and Telegraph Company respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on January 23, 1989. The Petitioner further respectfully suggests that, upon the issuance of a writ of certiorari, this Court summarily reverse the Eleventh Circuit's ruling on Respondent's cross-appeal, which is flatly inconsistent with decisions of this Court.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 859 F.2d 855, and is reprinted in the Appendix hereto ("App.") at A. The Eleventh Circuit's order denying rehearing *en banc* is reprinted at App. B.

## JURISDICTION

Respondent brought suit in the United States District Court for the Northern District of Georgia on December 6, 1983, alleging federal jurisdiction under 28 U.S.C. §§ 1331, 1332. During trial, at the close of Respondent's case, the district court granted a directed verdict to Petitioner on one claim. The jury found for Respondent on the remaining claims.

On appeal and cross-appeal, the Eleventh Circuit affirmed the jury verdict but reversed the directed verdict in an opinion dated November 4, 1988. App. A.* A timely filed petition for rehearing and suggested rehearing *en banc* was denied on January 23, 1989.

The jurisdiction of this Court to review the decision of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1) (1982).

## STATEMENT OF THE CASE

This case arises from a decision by the Court of Appeals for the Eleventh Circuit vacating the district court's directed verdict in favor of the employer in a case brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA").

Respondent Doris Stamey ("Stamey") claimed that Southern Bell Telephone and Telegraph Company ("Southern Bell") had discriminated against her in violation of the ADEA by denying her a management promotion, providing her with less compensation than younger employees, and terminating her in retaliation for having filed a charge of employment discrimination.

The trial of this case commenced on August 16, 1985. At the conclusion of Stamey's case in chief, Southern Bell

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* Petitioner does not seek review of the Eleventh Circuit's denial of Petitioner's appeal from the jury verdict. This Petition deals solely with the Court of Appeal's ruling on Respondent's cross-appeal.

moved for a directed verdict on all of her claims. Because Stamey was unable to establish that any promotion at issue occurred during the 180-day period that preceded the filing of her EEOC charge, the district court dismissed her promotion claim pursuant to Fed. R. Civ. P. 50(a). The remaining claims were sent to the jury, which returned individual verdicts against Southern Bell on all counts.

Southern Bell appealed the verdict on June 24, 1987. Stamey cross-appealed, arguing that the trial court erred when: 1) it dismissed Stamey's promotion claim pursuant to Southern Bell's motion for a directed verdict, 2) it ordered Stamey reinstated into a non-management position, and 3) it found that Southern Bell's liability for backpay ceased when it offered to reinstate Stamey into a non-management position comparable to the type of position she would have held had she remained on Southern Bell's payroll.

On appeal, the Court of Appeals for the Eleventh Circuit affirmed the judgment against Southern Bell. As to the issues raised in Stamey's cross appeal, the Court of Appeals held that the trial court erred when it directed a verdict against Stamey on her promotion discrimination claim. Instead of remanding the claim, however, the Court of Appeals simply "found" that Southern Bell *had* discriminatorily denied Stamey a promotion. After noting that "[t]he evidence appears adequate for a jury to find that [Southern] Bell denied Stamey a promotion to 'Chief Service Advisor' because of her age," the Court of Appeals remanded to the district court *solely* the issue of damages for the claim.[1] App. A at 14.

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[1] Based on its finding of liability, the Court of Appeals also attributed error to the trial court when that court ordered Southern Bell to reinstate Stamey into a non-management position and when it terminated Southern Bell's backpay liability as of the date that an offer of non-management employment was made. Accordingly, the Court remanded to the district court the question of whether Stamey should be

Following the Court of Appeal's decision, Southern Bell petitioned for rehearing and suggested rehearing *en banc*, drawing the Court's attention to the fact that Southern Bell had had *no* opportunity to present any evidence with respect to the promotion claim because the district court had directed the verdict at the close of Stamey's case. Southern Bell argued that judgment for Stamey, without notice or an opportunity for Southern Bell to be heard, was inappropriate. On January 23, 1989, the Eleventh Circuit denied the petition and suggestion without comment.

## REASONS FOR ISSUING THE WRIT AND GRANTING SUMMARY REVERSAL

### I. THE DECISION BELOW DENIES SOUTHERN BELL DUE PROCESS OF LAW AND SHOULD BE SUMMARILY REVERSED

#### A. *The Decision Below Makes Findings of Fact On An Incomplete Record.*

As noted above, the district court granted a directed verdict to Southern Bell on Stamey's promotion claim after Stamey was unable to identify any promotion or assignment involving one of the management titles into which she sought entry during the 180-day period that preceded the filing of her charge with the EEOC. In her cross-appeal, Stamey claimed that a management employee had replaced Stamey during the relevant time frame, and argued that this alleged replacement constituted a promotional opportunity.[2] The Eleventh Circuit,

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reinstated into a management title or whether additional monetary damages in lieu of such reinstatement would be sufficient. App. A at 14.

[2] As outlined in Southern Bell's Petition for Rehearing and Suggestion for Rehearing En Banc, Southern Bell denies that Stamey was replaced.

upon vacating the directed verdict, noted that "[Southern] Bell produced no counter-evidence [to this "replacement theory"]. App. A at 9.

The Eleventh Circuit's finding was based on an incomplete record. Because the trial court directed a verdict on the promotion issue, Southern Bell never even *addressed* the issue in its case in chief. If Southern Bell's motion for a directed verdict had been denied by the trial court (thereby affording Southern Bell its first opportunity to address the merits of the promotion claim), Southern Bell would have produced the "counter-evidence" the Court of Appeals had complained was lacking. Once the claim was dismissed, however, evidence on that issue was irrelevant and would not have been permitted by the trial court.

Even if the directed verdict was in error, the Court of Appeals improperly found that Stamey *had* unlawfully been denied a promotion within the 180-day period. As outlined below, under these circumstances the only proper remedy was to remand that issue for findings of fact at the trial level.

B. *The Decision Below Squarely Conflicts With Prior Decisions of This Court.*

In the decision below, the Court of Appeals found that Stamey was denied a promotion because of age, even though the merits of that issue *were not even addressed* by Southern Bell during its case in chief, and *were not considered* by the jury. This "finding" squarely conflicts with this Court's prior decisions regarding the due process rights of parties and the role of appellate courts.

In *Fountain v. Filson, Inc.*, 336 U.S. 681 (1949), the respondents challenged the district court's grant of summary judgment to the petitioner on the issue of the existence of a resulting trust. On appeal, the District of Columbia Court of Appeals reversed the District Court's grant of summary judgment and proceeded *sua sponte* to

direct entry of summary judgment for the respondents on a related claim on which the district court had not passed, and on which the petitioner had had no opportunity to present arguments or to dispute the facts. Upon review, this Court held that the Court of Appeals' grant of summary judgment for the respondents on a new issue, as to which the petitioner had had no opportunity to present a defense or to dispute the facts in the trial court, was in error. Accordingly, the judgment of the Court of Appeals was reversed, and the cause remanded to the district court for further proceedings concerning issues not passed upon in that court.

As in *Fountain*, Stamey appealed from the district court's grant of a directed verdict to Southern Bell on her promotion claim. The Eleventh Circuit not only reversed the district court's grant of directed verdict, but also, as in *Fountain*, proceeded to direct judgment against Southern Bell on the claim. As in *Fountain*, this was a claim on which the district court had not passed and on which Southern Bell had had no opportunity to present arguments or to dispute the facts. The Eleventh Circuit's decision in this case is in direct conflict with *Fountain* and other decisions of this Court concerning the role of appellate courts and the opportunity for a party to be heard.[3]

Following the same principles which underlie the holding in *Fountain*, this Court has held on numerous occasions that absent "exceptional cases . . . where injustice might otherwise result," *Hormel*, 312 U.S. at 556-57, where no issue remains and the facts are undisputed, *Turner v. City of Memphis, Tennessee*, 369 U.S. 350, 353 (1962),

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[3] *See, Hammond v. Schappi Bus Line*, 275 U.S. 164 (1927); *Hormel v. Helvering*, 312 U.S. 552 (1941); *Weade v. Dichmann, Wright and Pugh, Inc.*, 337 U.S. 801 (1949); *DeMarco v. United States*, 415 U.S. 449 (1974); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Moses H. Cone Memorial Hospital v. Mercury Construction Company*, 460 U.S. 1 (1983); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

or where the "proper resolution is beyond any doubt," *Singleton*, 428 U.S. at 121, none of which circumstances exist here, reviewing courts should not reach out to find facts and make their own determinations concerning questions not passed upon in the courts below. As this Court noted in *Pullman-Standard v. Swint*, 456 U.S. at 273, 291-92 (1982):

> "[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and . . . *the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.*" *DeMarco v. United States*, 415 U.S. 449, 450, n. 39, 94 S. Ct. 1185 (1974).

(emphasis added). *See also*, 5A, J. Moore & J. Lucas, *Moore's Federal Practice* § 52.06[2] (1982) ("Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made."); *Hammond*, 275 U.S. at 171-72; *Mercury Construction Company*, 460 U.S. at 29; *Weade*, 337 U.S. at 808; *DeMarco*, 415 U.S. at 450.

When an appellate court rules on a matter on which the district court has not previously passed, the petitioner is denied a full and fair opportunity (indeed *any* opportunity) to be heard, as due process requires. *Hormel* at 556-60. By ordering Stamey reinstated to a managerial position (or given monetary damages in lieu thereof), the Court of Appeals improperly found Southern Bell guilty of unlawful discrimination on a claim against which it was never permitted to defend. *See Meyer v. Missouri State Hwy. Comm.*, 567 F.2d 804 (8th Cir. 1977), *citing Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977) (appellate court "cannot make [its] own independent factual findings on a record barren of facts.")

## CONCLUSION

For all the foregoing reasons, and particularly because the Eleventh Circuit's decision is directly contrary to the Court's decision in *Fountain v. Filson, supra,* and *Pullman-Standard v. Swint, supra,* it is respectfully requested this Court grant the writ and summarily reverse the decision of the Eleventh Circuit.

Dated: April 21, 1989.

Respectfully submitted,

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APPENDIX A

**Doris STAMEY, Plaintiff-Appellee, Cross-Appellant,**

**v.**

**SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, Defendant-Appellant, Cross-Appellee.**

**No. 87-8494.**

United States Court of Appeals, Eleventh Circuit.

Nov. 4, 1988.

Appeals from the United States District Court for the Northern District of Georgia.

Before HILL and EDMONDSON, Circuit Judges, and WISDOM*, Senior Circuit Judge.

**WISDOM**, Senior Circuit Judge:

This case requires this Court to consider once again when an employer's business justification for terminating an employee is a pretext for age discrimination. Doris Stamey alleges that Southern Bell, her employer for 38 years, had placed older workers in a nonmanagerial job category destined to become obsolete; younger workers doing comparable work were given managerial jobs insulated from reductions in the workforce. She sued under the Age Discrimination in Employment Act (ADEA),[1] contending both that Bell had unfairly terminated her and that it had unfairly denied her a promotion into the managerial position. The jury found for Stamey on her termination complaint, but the judge granted a directed verdict on her promotion claim. Bell filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial judge denied Bell's motion.

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[1] 29 U.S.C. § 621 et seq.

Bell appeals. Stamey cross-appeals the judge's directed verdict on her promotion claim and part of the remedy. We affirm the judge's denial of Bell's motions and reverse as to Stamey's cross-appeal.

I.

Doris Stamey began her employment with Southern Bell as a long-distance operator in June 1943 when she was eighteen years old. After 10 months she was assigned to a training position, to train long-distance operators on company techniques and equipment. In 1955 Mrs. Stamey was assigned to the position of PBX Operator. In this position she visited customers' places of business to explain how Southern Bell's services might best be used by the customer and to instruct the customers on the use of their Private Board Exchanges. This job required both in-depth knowledge of Bell's services and the ability to adapt Bell's services to the customer's workplace. Based on the record, Stamey performed it well; the company assigned her to its best customers.

In 1973, Bell restructured its customer service system. It established two new job titles: "Service Advisor", a non-management position involving no direct customer contact, and "Chief Service Advisor", a managerial position supervising the Service Advisors and exclusively in charge of direct customer contact.[2] Almost every PBX Instructor, including Stamey, over the age of forty became a service Advisor. Stamey was then 48. After 1978, Bell gradually phased out Service Advisors by transferring them to other jobs. In 1981, Bell announced it would eliminate the position entirely. Stamey was then 56.

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[2] In subsequent reorganizations, "Service Advisor" was renamed "Customer Instructor" and "Chief Service Advisor" became "Associate Supervisor, Service Advisor Complex". The duties of the two positions remained about the same.

From 1973 until 1981, Stamey requested promotion to the Chief Service Advisor position but she was never promoted or offered the opportunity to train for the promotion. When Bell announced the elimination of the Service Advisor position, it offered Stamey the option of transfer to "any available equal or lower paying job". The jobs offered included entry-level receptionist, entry-level clerk, and typist.

In June 1981, Stamey filed charges of age discrimination with the EEOC. Several months afterward, Bell announced that it had reassessed its needs and determined that it needed one Service Advisor and that Stamey would be it. Stamey returned to work at Bell. Early on her first day back at work, she completed a form withdrawing her EEOC charges. Bell employees had already filled in the form except for her signature.

Six months later, in December 1982, Bell informed Stamey that it was eliminating her Service Advisor position. It then offered her early retirement or transfer to another job. Bell did not specify what job Stamey might take as an alternative to retirement, although it advised her that whatever job she took would pay less than the Service Advisor position.[3] She was told to consider her options during her month-long holiday that began at the end of 1982.

Stamey never learned what other jobs Bell was willing to offer her. The afternoon before her holiday began, two of her supervisors entered her office and requested that she turn over her keys. During her vacation, but before she had decided to take early retirement, a Bell employee called her at home to ask her to complete her retirement papers. Upon her return at the end of her vacation, but (again) before she had made her decision, she

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[3] Stamey would not have suffered immediate financial loss. Bell guarantees its employees their original salary for up to four years after transfer to a lower-paying job.

found that her office and work had been assigned to a Chief Service Advisor transferred from another office. Stamey's supervisors had been aware of the impending arrival of this managerial employee when they took Stamey's keys.

Stamey signed her retirement papers that same month. On the form announcing her decision to retire, she listed her reason for retiring as, "No job offer, replaced by management person from South Carolina". Six months later, in June 1983, she filed a second complaint with the EEOC, charging that Bell discriminated against her because of her age and that Bell retaliated against her for filing her first complaint with the EEOC. The EEOC gave her a right to sue letter, and she filed this action in December 1983.

The district court directed a verdict for Bell on Stamey's charge that Bell failed to promote her Chief Service Advisor because of her age. After a four-day trial, the jury found (1) that Bell's elimination of Stamey's Service Advisor position was a "constructive discharge"; (2) that Stamey was constructively discharged in retaliation for her filing of a complaint with the EEOC; (3) that Stamey was constructively discharged because of her age; and (4) that Bell was guilty of pay discrimination because the disparity in benefits between Service Advisor and Chief Service Advisor was determined by age rather than by any difference in work performed.

The district court entered judgment for Stamey accordingly. As part of her relief, the district court ordered that Stamey receive a nondiscriminatory salary from Bell until it reinstated her in a nonmanagement position comparable to the (now defunct) Service Advisor job. Bell then offered Stamey a nonmanagement job with the same pay as Chief Service Advisor. She refused it, asking for a management position. The district court found her re-

fusal "unreasonable" and terminated her right to the continuation of her salary.

Bell appeals the denial of its motion for judgment notwithstanding the verdict and a new trial, contending that there was a business justification for the restructuring and that Stamey was not qualified to be a Chief Service Advisor. Stamey cross-appeals, contending (1) that the district court should not have granted the directed verdict for Bell on the promotion claim; (2) that the district court should have ordered her reinstated as a Chief Service Advisor rather than reinstatement in a nonmanagerial position comparable to the (now defunct) Service Advisor job; and (3) that it was not "unreasonable" for her to decline reinstatement in a nonmanagerial job.

II.

This court should approve Bell's appeal of its motions for judgment notwithstanding the verdict only if Bell has presented evidence on its behalf so compelling that "reasonable men could not arrive at a contrary verdict".[4] In determining whether Bell has met this standard,

> the court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion.[5]

At each step, of course, we defer to the findings of fact reached in the trial court.[6]

As in other cases of employment discrimination, an action under the ADEA is a three-step process. First, the plaintiff must establish a prima facie case.[7] Second, the

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4 *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (*en banc*).

5 *Id.*

6 *See, e.g., Reynolds v. CLP Corp.*, 812 F.2d 671, 674-75 (11th Cir. 1987).

7 *Goldstein v. Manhattan Ind. Inc.*, 758 F.2d 1435, 1443 (11th Cir.), *cert denied*, 474 U.S. 1005, 106 S.Ct. 525, 88 L.Ed.2d 457 (1985).

defendant has the burden of proving that legitimate, nondiscriminatory reasons controlled its decision.[8] Finally, the plaintiff then has the burden of demonstrating that the reasons advanced by the defendant were pretextual.[9]

A. *Stamey Presented A Prima Facie Case*

A prima facie case under the ADEA contains four requirements: (1) the plaintiff must belong to the "protected group" consisting of employees between the ages of 40 and 64; (2) her status as an employee must be adversely affected; (3) she must be replaced by someone outside the protected group; and (4) she must be qualified for the job denied her.[10] Bell denies that Stamey was discharged; that she was replaced; and that she was qualified to work as a Customer Service Advisor. In short, Bell contends that Stamey has failed to establish the second, third, and fourth components of a prima facie case.

1. Stamey Was Adversely Affected

Bell avers that Stamey chose retirement and that, consequently, she was not terminated. Bell's evidence consists only of several admissions from Stamey that she preferred retirement to the jobs available to her. Stamey counters with ample evidence that she was terminated.

Stamey testified that she found the particular jobs Bell offered her before she filed her first EEOC complaint (entry-level receptionist, entry-level clerk, typist) "humiliating" and "insulting". The second time Bell tried to eliminate her Service Advisor job, it did not specify the other jobs she might take as an alternative to early re-

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8 *See, e.g., Archambault v. United Computing Systems, Inc.*, 786 F.2d 1507, 1512 (11th Cir. 1986).

9 *Id.*

10 This standard for a prima facie case derives from *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668,

tirement; it said only that they would be lower paying jobs. In the light of Bell's earlier offers, a jury could reasonably conclude that any job it would offer her would be demeaning to one with 38 years of experience in advising customers.[11]

Further, Stamey presented evidence that her supervisor demanded her office keys weeks before she was to make her "choice" about early retirement, that Bell did not eliminate her position as it contends but rather just changed the title, and that her replacement was already "at her desk, doing her work" before she had formally "chosen" to retire. From this evidence, a jury could reasonably conclude that Bell used direct coercion to force Stamey to "choose" retirement.[12]

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677 (1973). *See, e.g., Reynolds*, 812 F.2d at 674 (applying *McDonnell Douglas* in ADEA case).

11 Employees may be constructively discharged by a demeaning demotion or transfer. *See Williams v. Caterpillar Tractor Co.*, 770 F.2d 47 (6th Cir. 1985).

12 Bell makes much of a distinction between termination and "constructive discharge". Bell argues that Stamey must show she was terminated because she did not plead constructive discharge in her complaint. At oral argument, Bell's counsel suggested that "constructive discharge" complaints were appropriate when an employee offered "subjective" reasons for finding working conditions so difficult or unpleasant that she felt compelled to resign; "termination", he said, was appropriate where there were "objective" justifications for the employee's decision to leave a job. Bell presents neither authority nor reasoning for distinguishing the proof required for constructive discharge from that needed for termination.

A Plaintiff alleging constructive discharge must establish that the terms and conditions of employment were so onerous that a reasonable person would feel compelled to resign. *See, e.g., Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir. 1977), *cert denied*, 434 U.S. 966, 98 S.Ct. 506, 54 L.Ed.2d 451 (1978). The reasonable person standard injects objectivity into a jury's deliberations over complaints of constructive discharge, thereby blurring the line between subjective and objective so much as to make Bell's distinction useless. In addition, we see little reason to deny Mrs. Stamey the fair inference from the evidence that she was constructively discharged simply

In any event, Stamey can prevail even if the evidence does not support an inference that she was terminated or constructively discharged. The Act forbids far more than merely discriminatory discharge and hiring practices. It states:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual *or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment* because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunity *or otherwise adversely affect his status as an employee*, because of such individual's age . . .[13]

A reasonable jury could conclude that Stamey's treatment came within these terms.

2. Stamey Was Replaced

Stamey presented evidence that upon her return to Bell after her December 1982 vacation, someone else was already "at her desk, doing her work". Bell responds that the employee Stamey observed was doing different work. A jury could reasonably have concluded that Stamey was replaced. In other parts of her case, she presented evidence establishing that Customer Service Advisors did the same work as nonmanagement Customer Advisors. Further,

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because she did not plead it. Placing so much weight on the pleadings would run contrary to the broad remedial purposes of the ADEA and to the spirit of the Federal Rules of Civil Procedure. Finally, because the evidence supports an inference that she was terminated, Bell's argument amounts to nothing more than a squabble over wording.

[13] 29 U.S.C. Section 623(a) (emphasis added).

she testified that she observed the woman in her office doing the work she would have been doing had she not been terminated. Bell produced no counter-evidence.[14]

3. Stamey Was Qualified

Bell next disputes that Stamey has established the final prong of the *McDonnell Douglas* test.[15] It argues that Stamey was not qualified for promotion to the managerial "Chief Service Advisor" position. A reasonable jury could have concluded otherwise. Stamey presented evidence that she was already doing much of the same work as a "Chief Service Advisor". Much of Stamey's "non-managerial" work was clerical; one young manager admitted under cross examination that her "managerial" tasks were actually clerical in nature. Stamey proved herself capable of even the less mundane "managerial" chores. For example, one post-reorganization customer praised Stamey for a presentation she made after having had very little time to prepare; Stamey's supervisor was to have made the presentation but found she could not prepare herself in the short time allowed. These examples fit well into a larger pattern, where the Service Advisors trained the Chief Service Advisors and often advised them on a daily basis. The similarity in qualifications for the jobs may have grown out of one aspect of Bell's reorganization. The new Chief Service Advisors no longer visited customer's workplaces. Instead, employees of Bell's customers attended training sessions at Bell, then returned to their workplaces. In this system, the onus of adapting Bell's services to the customers' work environments shifted slightly to the trained employees of the customers; it was perhaps inevitable that the new Chief

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[14] Bell's argument foreshadows its contention that Stamey was not replaced, but that her position was eliminated as a result of changes in its business. Bell therefore asks this court to regard Mrs. Stamey's case under the tests applicable to work force reduction. This argument is discussed at greater length in Section IIB.

[15] *See* n. 10.

Service Advisors would have less reason to acquaint themselves with the intricacies of Bell's equipment than had the PBX Instructors who were by then their subordinates. The jury could conclude that Stamey established that the qualifications for the "Chief Service Advisor" position were not really higher than those for the "Service Advisors". This, considered with the evidence of general discrimination against older employees, provides a sufficient basis for the jury's verdict on age and pay discrimination. We therefore hold that Stamey did present a prima facie case that Bell discriminated against her because of her age.

B. *Bell Did Not Rebut the Prima Facie Case*

Bell next argues that any adverse effect suffered by Stamey derived from legitimate, nondiscriminatory business decisions. Throughout the 1970's an increasing percentage of its customers turned to systems more sophisticated than the PBX systems familiar to Mrs. Stamey. The 1973 decision to bifurcate its customer service program reflected its anticipation of this trend, Bell avers.[16] As customers switched to newer machines, demand for advice on the older PBX models declined, giving Bell a legitimate, business reason to scale back that portion of its customer service operation. Bell contends that its concerns about changes in the system resulted in the force reduction that prompted Stamey's first EEOC complaint in 1981 and again in 1982, when Bell notified Mrs. Stamey that it intended to eliminate her position entirely. In short, Bell argues, Mrs. Stamey was not replaced but was instead caught in a reduction in its workforce.

Bell here focuses myopically on its immediate decision to transfer or demote Mrs. Stamey and leaves in the background the restructuring of its workforce. Mrs.

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[16] This does not explain why one group consisted of nonmanagerial employees while employees in the other group were granted managerial status.

Stamey presented uncontroverted evidence that the former PBX Instructors were generally older. All of them became Service Advisors, nonmanagement positions without customer contact. The new Chief Service Advisor positions were filled principally by younger new-hires. Stamey also presented evidence that as the 45 (generally older) Service Advisors were phased out, only five became Chief Service Advisors; all of those promoted were under 40. In fact, according to Stamey's evidence, since 1963, no nonmanagement employee over 50 in the PBX customer service program had been promoted to management and that, from 1973 to 1978, no nonmanagement employee over the age of 40 was promoted to management.

In response, Bell asserts only vague "business reasons" for the restructuring. In particular, Bell does not respond to Stamey's evidence that in practice, a Chief Service Advisor did not require higher qualifications than a Service Advisor.[17]

Bell's rebuttal argument can succeed only on a foreshortened horizon. A broader perspective reveals that Bell attempted to present a youthful image to its customers. Mrs. Stamey presented evidence that her inability to win promotion within Bell resulted directly from this earlier reorganization of Bell's customer service program. One witness testified:

> I don't think she [Stamey] was seriously considered for promotion because she did not fit the image that they

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[17] Bell also fails to address the proper argument. It stresses that there was no discrimination by age within the ranks of the Service Advisors. Mrs. Stamey does not contest this conclusion. She argues instead that older workers were excluded from the chief service Advisor category. The proper comparison, then, is not *among* the Service Advisors but *between* them and the Chief Service Advisors. *See, e.g., Lindsey v. Southwestern Bell Telephone Co.*, 546 F.2d 1123, 1124 (5th Cir. 1977) (ADEA claims require comparison of employees selected for position with those available in the entire employee group).

> [Bell] were wanting to project of the department at the time. . . There was a pattern set in the department whereby some of the older women were never . . . seriously considered for promotion.

The effect of Bell's restructuring violates a central teaching of this Court's decisions in ADEA cases. An employer may not organize its workforce to expose older employees to reductions while insulating younger employees. In *Williams v. General Motors Corporation*,[18] Judge Hill correctly noted than an "employee-rotation plan that effectively shifted 'protected' workers into jobs likely to bear the brunt of a reduction in force" would signal age discrimination.[19] The strength of Stamey's evidence contrasts with the weakness of statistical evidence in *Goldstein*, where approximately half of the employees promoted in *Goldstein* (including Goldstein's own replacement) were over forty years old.[20] This Court rejected Goldstein's statistical evidence because it did not establish that the company had started a "youth movement".[21] Stamey has done so. We therefore conclude that Bell has not met its burden of rebutting Stamey's prima facie case. Accordingly, we affirm the trial judge's refusal to grant Bell's motion on Stamey's termination claim.

C. *Bell Retaliated Against Stamey*

Bell also appeals the judge's refusal to grant its motion as to Stamey's retaliation claim. It denies any

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[18] 656 F.2d 120 (5th Cir. Unit B 1981).

[19] 656 F.2d at 130 n. 15. *Williams* discussed the evidence a plaintiff must present to establish a prima facie case. Its discussion is nonetheless applicable. *See also MCorstin v. United States Steel Corp.*, 621 F.2d 749, 754 (5th Cir. Unit B 1981) ("[A] pattern of terminating older workers when a reduction in force occurred" allows the inference that an employer's nondiscriminatory reasons were pretexts for discrimination); *cf. McCuen v. Home Insurance Co.*, 633 F.2d 1150, 1150-51 (5th Cir. Unit B 1981).

[20] 758 F.2d at 1444.

[21] *Id.*

"settlement" of Stamey's first complaint. Stamey, however, offered evidence from which a jury could conclude that there was such a "settlement" and that Bell reneged on it. Until her 1981 EEOC charge, Bell insisted that the position of Customer Instructor (filled by Stamey and some fifty others) needed to be eliminated. After she filed the charge, however, Bell made a "reassessment" and came to the convenient conclusion that it would continue to need *one* Customer Instructor and that Stamey should be it. The very day that Stamey returned to her (now unique) job as Customer Instructor, she was presented with EEOC forms, already typed, withdrawing her charges against Bell.

Less than a year later, Bell's "need" for a lone Customer Instructor evaporated. Bell contends that "this was prompted by the anticipated transfer of business marketing [including PBX service] to American Bell" as part of the AT&T divestiture. Stamey points out that the transfer of these functions did not actually occur until 1984. Whatever triggered the elimination of her job, the direct evidence discussed above strongly suggests that Bell thereafter unceremoniously pushed her into early retirement.

## III. STAMEY'S CROSS-APPEAL

### A. *The Trial Judge Erred In Ordering A Directed Verdict Against Stamey On Her Claim That Bell Illegally Failed to Promote Her*

Stamey can sue only for age discrimination violations occurring within 180 days of the filing of her June 1983 complaint with the EEOC.[22] Accordingly, to present the jury with the question of discriminatory refusal to promote, Stamey must show that she was passed over for promotion to Chief Service Advisor in favor of a younger employee in the 180 days before she filed her June 1983

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[22] 29 U. S. C. § 626 (d) (1).

complaint with the EEOC. The district court directed a verdict for Bell on this issue because Stamey admitted that Bell promoted no one to Chief Service Advisor during this period.

Stamey argues that Bell's replacement of her with a Chief Service Advisor, younger than Stamey and transferred from another office, should suffice for the 180-day requirement. Bell responds that this Stamey's replacement was already a Chief Service Advisor and thus, was not "promoted".

The formalism Bell urges in the construction of the 180-day rule runs counter to the remedial scheme of the Act. Stamey, a Service Advisor, was replaced with a Chief Service Advisor. This upgrading of her position is plainly a promotion opportunity. It could not be plainer that Stamey was passed over for that opportunity by being terminated. The evidence appears adequate for a jury to find that Bell denied Stamey a promotion to "Chief Service Advisor" because of her age.

B. *The Trial Judge Erred In Ordered Stamey To Accept A Non-Management Position With Bell*

The district court ordered Stamey reinstated in a non-managerial position at a nondiscriminatory salary. Because the jury found Bell guilty of salary discrimination, but (because of the partial directed verdict) *did not* find Bell guilty of a discriminatory refusal to promote Stamey to Chief Service Advisor, this remedy is consistent with the verdict. We have found, however that the trial judge erred in directing the partial verdict for Bell. Hence, Stamey's refusal of the reinstatement Bell offered would not be "unreasonable" and her salary should not have been discontinued. We remand this aspect of the case to the district judge to determine whether Stamey at this point deserves reinstatement as a Chief Service Advisor or whether monetary damages are sufficient.

## IV.

We affirm the judgment against Bell but reverse as to Stamey's cross-appeal. Accordingly, the judgment of the trial court is AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NO. 87-8494

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DORIS STAMEY,

Plaintiff-Appellee,
Cross-Appellant,

versus

SOUTHERN BELL TELEPHONE
& TELEGRAPH COMPANY,

Defendant-Appellant,
Cross-Appellee.

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Appeal from the United States District Court for the
Northern District of Georgia

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**ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC**

(Opinion November 4, 11 Cir., 1988, ___ F.2d ___ ).

(January 23, 1989)

Before HILL and EDMONDSON, Circuit Judges, and WISDOM*, Senior Circuit Judge.

**PER CURIAM:**

(x) The Petition (s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill

United States Circuit Judge

*Honorable John Minor Wisdom, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX C-1

**The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982).**

626. Recordkeeping, investigation, and enforce--ment . . .

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling

(1) Section 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section

255 of this title shall be tolled, but in no event for a period in excess of one year.

. . .

APPENDIX C-2

**Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict**

**(a) Motion for Directed Verdict: When Made; Effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

Docket No. 88-1733

In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1988

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

*Petitioner,*

v.

DORIS STAMEY

*Respondent.*

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND SUGGESTION FOR SUMMARY REVERSAL

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## QUESTION PRESENTED

In its Petition for a Writ of Certiorari, Southern Bell states the question presented as whether the Eleventh Circuit erred when it entered judgment against Southern Bell on a claim of age discrimination after it had reversed the District Court's grant of a directed verdict on that claim. That question can only be fashioned by mischaracterizing the Court of Appeal's opinion, and by omitting reference to material parts of the record. When all of the relevant facts are considered, it is plainly apparent that the question presented by Southern Bell in seeking a writ of certiorari is, at best, hypothetical.

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## RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND SUGGESTION FOR SUMMARY REVERSAL

## OPINIONS BELOW

The March 24, 1987 district court order providing for equitable relief is reported at 658 F.Supp. 1152 (N.D. Ga. 1987). The November 4, 1988, opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 859 F.2d 855 (11th Cir. 1988).

## JURISDICTION

Petitioner, Southern Bell Telephone and Telegraph Company, has invoked the jurisdiction of this court pursuant to 28 U.S.C. §1254(1). As the question presented by Southern Bell is hypothetical in nature, respondent submits that the court is without jurisdiction to grant the petition. *Asbury Hospital v. Cass County*, 326 U.S. 207 (1945).

## RESPONDENT'S STATEMENT OF THE CASE

Southern Bell's statement of the case fails to present an accurate picture of where the matter stands. In this age discrimination case, the Eleventh Circuit held that the District Court was in error when it granted Southern Bell's motion for a directed verdict on Stamey's promotion claim. The Eleventh Circuit did not enter a judgment in favor of Stamey on that claim, as Southern Bell suggests. Rather, the Court of Appeals remanded the case to the District Court to reconsider equitable relief in a manner that is consistent with that ruling, and with the facts already found by the trial jury. The following chronology is provided to describe the hypothetical nature of Southern Bell's argument.

This case proceeded to trial on four different theories of liability. Respondent claimed that Southern Bell had terminated her, had retaliated against her, had failed to promote her, and had failed to pay her management level compensation on account of her age. In petitioning for certiorari, Southern Bell only mentions the promotion claim. Specifically, Southern Bell fails to acknowledge that at trial, Stamey proved that she had actually been performing management level work, but that Southern Bell refused to pay her management compensation for that work on account of her age. (*See* Petition for Certiorari, App. A. at 4). The jury's verdict on August 23, 1985, determined that Southern Bell had willfully failed to pay Stamey management compensation on account of her age, and awarded damages for that loss.[1]

In an order entered on June 23, 1986, the District Court determined that reinstatement was the appropriate equitable remedy. Since it had directed a verdict on Stamey's promotion claim, the District Court agreed with Southern Bell's argument that Mrs. Stamey should only be reinstated to a nonmanage-

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[1]The District Court granted a directed verdict based on Southern Bell's argument that plaintiff had proved no promotion within the 180 day period preceding plaintiff's charge of discrimination. 29 U.S.C. §626(d)(1). Since the plaintiff showed, however, that her position had been filled by a younger management employee, the Eleventh Circuit observed that it could not be plainer that Stamey was passed over for that promotion opportunity by being terminated.

ment position. In its order, the court reasoned as follows: ". . . the court agrees with defendant that reinstatement to a management position is not required. Plaintiff's claim that she was denied the opportunity to be promoted into one of the various management positions that she alleges were successor positions to her customer instructor title was dismissed by this court. For this reason plaintiff is only entitled to be reinstated to a position similar to that provided other Customer Instructors upon the termination of their position." (June 23, 1986 Order, pp. 7-8). The Eleventh Circuit observed this to be the wrong comparison. (*See* Petition for Certiorari, App. A at n. 17).

It is therefore quite certain that the District Court based its decision on equitable relief on the directed verdict which the Court of Appeals found to be in error. The Eleventh Circuit has simply sent this case back to the District Judge to reassess that matter free of the error which influenced its earlier decision. Such an assessment, of which Southern Bell now complains, had taken place earlier without complaint.

Even though the District Court denied reinstatement to a management position because of the directed verdict, in its order of March 24, 1987, 658 F.Supp. at 1156, the District Court concluded that Stamey should receive backpay at a management level from the date of the jury's verdict, August 23, 1985, until July 23, 1986, the date it found Stamey to have been unreasonably denied reinstatement to a nonmanagement level. The court explained that Stamey was entitled to management level compensation for this period because the jury had found that Southern Bell had willfully discriminated in pay and benefits, and that its order should conform to those findings of fact. 658 F.Supp. at 1156. Likewise, any order of the District Court on remand should conform to the verdict, and to the Eleventh Circuit's opinion.

## REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petition for a Writ of Certiorari should be denied for the simple reason that there is nothing before the court, other than a hypothetical question, for review. The Eleventh Circuit found that the directed verdict granted by the District Court on

Stamey's promotion claim was in error. Therefore, the equitable relief fashioned by the District Court in reliance upon that ruling was in error. The Eleventh Circuit did not enter judgment on any claim, as Southern Bell suggests, nor did it find that Stamey had been denied a promotion on account of her age. (Petition for Certiorari at 3). It merely determined that the assessment of post verdict relief should be reexamined without the influence of the erroneous directed verdict.

The jury returned a verdict in this case that Stamey had been willfully terminated, and that she had been willfully discriminated against in pay because of her age. The case has been remanded to the District Court to reassess the matter of equitable relief in a manner consistent with those findings, and without the legal error that infected its first determination. It is the function of the District Court to determine matters of equitable relief in an age discrimination case. *O'Donnell v. Georgia Osteopathic Hospital*, 748 F.2d 1543 (11th Cir. 1984); *McNeil v. Economics Labratory, Inc.*, 800 F.2d 111 (7th Cir. 1986). In fashioning such relief, the District Court may not disregard the jury's verdict, but must base its decision on factual findings that are consistent with those made by the jury. *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1101 (8th Cir. 1982). The District Court followed these guidelines in its determination of post verdict damages from the date of the verdict until the date when it found that Mrs. Stamey had unreasonably declined reinstatement to a nonmanagement position. 658 F.Supp. at 1156. Southern Bell has not claimed any error in that assessment. The Eleventh Circuit has now said that the District Court should continue that logical process without the error that Southern Bell invited. There is no logical or legal reason for Southern Bell to now claim that it has been denied an opportunity to be heard.

## CONCLUSION

In this case, Southern Bell has been fully heard on the merits. The case has been remanded to the District Court to consider the remaining matters of equitable relief in accordance with the factual findings that have already been made by the jury, and in accordance with the Eleventh Circuit's opinion which simply removed an erroneous conclusion previously reached by the District Court. *Fountain v. Filson, Inc.*, 336 U.S. 681 (1949), and the other cases cited by Southern Bell in its petition are simply inapposite. This is not a case where summary judgment has been granted without affording the losing party any notice or right to be heard. The Eleventh Circuit Court of Appeals has not resolved any factual dispute, but has simply remanded the issue of post verdict relief to the District Court for a new determination, free of the error which, at Southern Bell's invitation, adversely affected its first determination. For these reasons, it is respectfully urged that the Petition of Southern Bell Telephone & Telegraph Company for a Writ of Certiorari be denied.

Respectfully submitted,

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May 22, 1989